Supreme Court, U.S.
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No. 94- ____

In The
SUPREME COURT of the UNITED STATES
October Term, 1994

PEE DEE FEDERAL SAVINGS BANK,

Respondent,

v.

JOHN T. CRAWFORD AND MARY A. CRAWFORD,

Petitioners,

Petition For A Writ Of Certiorari To The Supreme Court Of The United States Of America

---

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTION PRESENTED FOR REVIEW

Does failure to give timely notice of a mortgage foreclosure hearing, and the South Carolina Court Systems' enforcement of that foreclosure violate the Fifth and Fourteenth Amendments' guarantee of Procedural Due Process, where both liquidated and non-liquidated damages are sought?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, John T. Crawford and Mary A. Crawford, and the Respondent, Pee Dee Federal Savings Bank.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners John T. Crawford and Mary A. Crawford respectfully pray that a writ of certiorari issue to review the June 14, 1993, judgment and opinion of the South Carolina Court of Appeals, and the September 22, 1994, denial of their Petition for Certiorari to the South Carolina Supreme Court in the above-captioned proceeding.

OPINIONS BELOW

The Decree of Foreclosure of the Court of Common Pleas dated January 10, 1991, was not published but is included in the appendix hereto, at App. 1, infra.

The Order of the Court of Common Pleas denying Petitioner's Motion to Vacate Judgment, dated December 4, 1991, was not published but is included in the appendix, at App.8 , infra.

The opinion and judgment of the South Carolina Court of Appeals dated June 14, 1993, was not published but is included in the appendix, at App.16 , infra.

The South Carolina Court of Appeals' denial of Petitioner's Petition for Rehearing dated September 8, 1993, was not published but is included in the Appendix, at App.18, infra.

The South Carolina Supreme Court's denial of Petitioner's Petition for a Writ of Certiorari dated September 22, 1994, was not published but is included in the Appendix, at App. 19 , infra.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the South Carolina Court of Appeals of June 14, 1993. Petitioner's subsequent Petition for Rehearing was denied on September 8, 1993. Furthermore, the Petitioner's Petition for a Writ of Certiorari to the South Carolina Supreme Court was denied on September 22, 1994. The United States Supreme Court has jurisdiction to review all

cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution provide in pertinent part that a parties whose significant rights in property are to be affected by a legal proceeding are entitled to be heard and, in order that they may enjoy that right, they must be given adequate notice thereof.

STATEMENT OF THE CASE

This action for foreclosure on real estate mortgages was commenced with the filing of a Summons and Complaint and Notice of lis pendens for Docket Number 90-CP-33-300, Docket Number 90-CP-33-301 and Docket Number 90-CP-33-302 in Court of Common Pleas for the Twelfth Judicial Circuit of South Carolina, on November 6, 1990, after the Petitioners became delinquent with their monthly payments. The Bank did not notify them of the delinquency pursuant to the terms of the mortgage but rather, contacted its attorney, Mr. J.P. Williams, and consequently the Appellants-Defendants were served with the Summon(s) and Complaint(s) on November 9, 1990. The Complaint(s), prayed for foreclosure of mortgage liens held by the Respondent against four individual pieces of property owned by the Petitioners.

Although they did not file a written Answer, the

Petitioners did visit the Bank within 30 days after the service of the Summons and Complaint and attempted to re-instate the loans. They were informed that the bank would not allow them to re-instate the loans, that only full payment of all amounts owed under the mortgage would stay the proceedings. Two additional attempts were made by Petitioners to reinstate their loans but these attempts proved futile despite the fact that on another occasion when the Petitioners had become delinquent, the Bank had allowed them to reinstate the loans by paying arrearages plus attorney's fees.

The secondary lienholders filed Answers, and the Respondent sought and received an Order of Reference, (Docket Numbers 300, 301, and 302) from the Circuit Court on January 2, 1991. The matter was duly referred to a special referee, and came before the Honorable W.B. Norton for a hearing on the foreclosure on January 10, 1991. Though the Respondents made numerous attempts to negotiate with representatives of the Bank, they were not notified of, nor did they give consent to, the Order of Reference.

Contrary to statements made on the record, by Respondent's counsel, no Affidavit of Default was filed in this matter, and no entry of default was made by the Clerk of Court, nor was an Order of Default signed by the Court prior to the foreclosure hearing on January 10, 1991. The Judgment Record Roll in the matter, Docket Numbers 90-CP-300, 301, and 302, does not contain a record of notice of the foreclosure hearing to the Appellants.

The Petitioners assert that they were not given notice of the date, time, and place of the foreclosure hearing. Respondent's counsel asserts, by way of affidavit filed during the Appellants Motion to Vacate hearing, on October 29, 1991, that the Petitioners were given two days oral notice of the foreclosure hearing, at a meeting in his office, held approximately nine months prior. However, recorded

testimony, from the foreclosure hearing indicates that Respondent's counsel informed the court that an Affidavit of Service and an Affidavit of Default were both filed with the Court.

During the foreclosure hearing Respondent's counsel moved into evidence the promissory notes and the mortgages for each piece of property listed in the Complaint(s). Testimony was taken from the Respondent's Vice President as to (1) the terms of indebtedness; (2) the number of months that the Appellants were in default on their mortgage notes; (3) the monthly indebtedness; and (4) the date the note was accelerated - October 15, 1990. The Court ignored all other items contained in the mortgage, including those terms regarding the requirement that proper notice of such proceedings be given. Testimony was also taken as to the attorneys fees owed for each Cause of Action: Docket Number 300, total amount $6,000.00; Docket Number 301, total amount $2,000.00; and Docket Number 302, total amount $3,000.00. The Secondary lienhlders submitted sworn testimony requesting attorney's fees Furthermore, the Answer of one of the secondary lien holders requested costs and disbursements.

The Decree of Foreclosure as Ordered held the following: (1) that the Appellant-Defendants were in default; (2) that the Secondary lienholders had filed an Answer; (3) that an Affidavit of Default had been filed; (4) that testimony and plaintiff's exhibits were received into evidence without objection; (5) that the monthly notes of indebtedness were as testified; (6) that the plaintiffs had duly executed mortgages and promissory notes; (7) that the terms and conditions of the notes and mortgages were broken by the Appellants-Defendants; (8) that the entire note(s) on each indebtedness was accelerated and the entire amount became due and payable of Docket Number 300- $36,333.85, Docket Number 301 - $31, 584.92, and Docket Number 302 - $34,214.28;

(9) that the promissory note and mortgage provided for reasonable attorney fees and costs; (10) that the attorneys fees be awarded in the amount of $6,000.00 for Docket Number 300, $2,000.00 for Docket Number 301, and $3,000.00 for Docket Number 302; (11) that costs be awarded in these actions; (12) that the right of redemption be forever barred; and (13) that the mortgaged lands and property be sold at public auction to the highest bidder on February 4, 1991; and (14) that the lienholders be paid in the order of their established priorities out of the proceeds of the sale.

The Special Referee filed a Report of Sale on February 19, 1991, with Exhibits itemizing costs and expenses and a Constructive Receipt of Sale.

The Petitioner retained an attorney who initially filed a Notice of Intent to Appeal the Decree of Foreclosure on February 4, 1991, but subsequently abandoned the Appeal and filed a Motion to Vacate the Judgment Decree of Foreclosure.

The matter was originally scheduled by the Clerk of Court before the Circuit Court. Because the Order of Reference directed that all appeals would be made directly to the Supreme Court, the Circuit Court referred the Motion to Vacate to the Special Referee for a hearing. The Appellants Motion to Vacate was based on South Carolina Rules of Civil Procedure, Rules 5(a),and 60(b)(5), as well as the records, judgments, pleadings and documents in the case.

Respondent's Counsel filed an affidavit with the Special Referee less than five days prior to the hearing on Appellants' Motion to Vacate.

All parties were present at the hearing on Appellants' Motion to Vacate, and the Special Referee entered an Order on December 5, 1991, refusing to vacate the prior Judgment Decree of Foreclosure. From that Order refusing to vacate, the Petitioners appealed the matter to the South Carolina

Court of Appeals, which affirmed the lower court's Order. The Court based its decision primarily on the affidavit presented by Respondent's Counsel in the Motion to Vacate hearing , which alleged that the Petitioners had actual knowledge of the date, time, and place of the foreclosure hearing. A Rehearing was requested by the Petitioners but was denied. Pee Dee Federal Savings Bank v. John T. Crawford and Mary A. Crawford, 93-UP-179 (S.C. St. App. filed June 14, 1993). On September 22, 1994, the South Carolina Supreme Court denied Petitioners' petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

THE SOUTH CAROLINA COURT OF APPEALS FAILED TO PROPERLY PROTECT THE RIGHTS TO PROCEDURAL DUE PROCESS WHICH SHOULD BE AFFORDED MORTGAGORS IN FORECLOSURE PROCEEDINGS WHEN IT UPHELD A FORECLOSURE WHEREIN ADEQUATE NOTICE OF THE FORECLOSURE, AS REQUIRED BY THE TERMS OF THE MORTGAGE WAS NOT GIVEN.

This Petition invites the Court to resolve the issue of whether mortgagors are entitled to formal written notice of foreclosure proceedings, in order for their rights in real property to be terminated. It is well settled that in mortgage foreclosure actions, the property interests of mortgagors is affected. The Court has previously noted that "there can be no doubt that at a minimum, [the Due Process Clause of the Fifth Amendment requires] that deprivation of life, liberty or property by adjudication be precedent by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.

306, 313 (1950). "For more than a century the central meaning of procedural due process has been clear: `Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), citing *Baldwin v. Hale*, 1 Wall 223, 233. Furthermore, in *Armstrong v. Manzo*, 380 U.S. 545, 552 (1964), the Court stated that notice and opportunity to be heard, "must be granted at a meaningful time and in a meaningful manner."

The facts in the present case indicate that the Petitioners may have been given verbal notice of the foreclosure hearing as much as two or three days in advance, but that there was no formal written notice given. It is important to note that "[t]he requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions." *Fuentes*, at 81. The requirement that adequate written notice be given in situations involving mortgage foreclosures, only serves to better ensure the likelihood that the proceedings will be fair, and not result in arbitrary or mistaken deprivations of property. Despite the fact that the Petitioner had not previously answered the Respondent's Complaint, there is a fundamental unfairness involved in conducting a hearing wherein a party's property is to be taken, without first having provided them with adequate notice and opportunity to be heard. Due to past experiences with Pee Dee Federal, the Petitioners were until just prior to the hearing, of the impression that the Respondent would allow them to cure their default and reinstate their loan. They were therefore surprised by the fact that Respondent completed foreclosure proceedings and did not seek counsel or otherwise adequately prepare to defend their property rights. "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Id.*, at 81. Had the Petitioners been given

adequate written notice of the hearing, they would have had an opportunity to properly prepare their defense, and a more fair and just result would likely have been the outcome. Regardless of the outcome of the foreclosure hearing, the wrong that was committed against the Petitioners by conducting the hearing under such conditions is ultimately the issue. "[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Id.*, at 82.

The Petitioners now asks the Court to grant their Petition for Certiorari so that it may clarify whether adequate written notice is required in foreclosure actions. If the decisions of the lower courts are allowed to stand, the property interests of all mortgagors will remain in jeopardy of being terminated with little or no warning, should they become delinquent on their loan payments.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted, and the Court should allow Petitioners to file their brief and articulate more comprehensively why the South Carolina Court of Appeals failed to properly protect the rights to procedural due process which should be afforded mortgagors in foreclosure proceedings when it upheld a foreclosure wherein adequate notice of the foreclosure, as required by the terms of the mortgage, was not given. If the South Carolina Court of Appeals' decision goes unreviewed it will mean that mortgages may be foreclosed and citizens rights in their property be terminated without regard to whether adequate notice of the proceedings is given.

Respectfully submitted,

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF MARION	)	90-CP-33-302
	)	(Filed Jan. 14, 1991)
PEE DEE FEDERAL SAVINGS BANK,	)	
PLAINTIFF,	)	
vs.	)	
JOHN T. CRAWFORD, MARY A. CRAWFORD, MARION NATIONAL BANK and PELICAN BUILDING CENTERS OF HORRY-GEORGETOWN, INC., D/B/A MYRTLE BEACH LUMBER COMPANY	)	
DEFENDANTS.	)	

DECREE OF FORECLOSURE

This is an action for foreclosure of a Real Estate Mortgage. The Summons and Complaint bearing date of November 2, 1990, were duly filed in the office of the Clerk of Court for MARION county, SOUTH CAROLINA, on November 6, 1990, and were personally served upon the defendants John T. Crawford and Mary A. Crawford on

November 9, 1990, as evidence by Affidavits of Personal Service filed in the cause. The defendants Marion National Bank and Pelican Building Centers of Horry-Georgetown, Inc., d/b/a Myrtle Beach Lumber Company have been duly served and have filed their Answers in a timely manner. The Defendants John T. Crawford and Mary A. Crawford are now in default and an Affidavit of Default has been filed. This case was referred to me, as Special Referee, by Order dated January 2, 1991, to take the testimony and to enter judgment, without further Order of the Court.

The matter was heard by me as a Special Referee on January 10, 1991, at Marion, South Carolina. Appearing at said reference was John P. Williams, Jr., attorney for Plaintiff, and J. M. McLendon, attorney for Defendant Marion National Bank. The testimony given and taken at the residence is attached hereto.

Offered and admitted into evidence without objection on behalf of the Plaintiff were a promissory Note and a Real Estate Mortgage, made and executed by the Defendants John T. Crawford and Mary A. Crawford in favor of Plaintiff, in the principal sum of Thirty-Five Thousand and No/100's ($35,000.00) Dollars. The Promissory Note and Real Estate Mortgage are dated February 26, 1986, which said Mortgage having been recorded on February 26, 1986, in Real Estate Mortgage Book 300, at page 201, in the office of the Clerk of Court for Marion County, South Carolina.

Offered and admitted into evidence without objection on behalf of the Defendant Marion National Bank were a Promissory Note and a Real Estate Mortgage, made and executed by the Defendants John T. Crawford and Mary A. Crawford in favor of said Defendant, in the principal sum of Ten-Thousand and No/100's (10,000.00) Dollars. The Promissory Note and Real Estate Mortgage are dated November 8, 1988, with said Mortgage having been recorded on November 10, 1988, in Real estate Mortgage Book 341,

at page 156, in the office of the Clerk of Court for Marion County, South Carolina.

Offered and admitted into evidence without objection on behalf of the Defendant Pelican Building Centers of Horry-Georgetown, Inc. were a Promissory Note and a Real Estate Mortgage, made and executed by the Defendants John T. Crawford and Mary A. Crawford in favor of said Defendant, in the principal sum of Forty-Three Thousand Five Hundred Ninety-Three and 88/100's ($43,593.88) Dollars. The Promissory Note and Real Estate Mortgage are dated August 9, 1989, with said Mortgage having been recorded on August 9, 1986, in Real estate Mortgage Book 351, at page 33, in the office of the Clerk of Court for Marion County, South Carolina.

From the testimony and evidence having been review of the exhibits and the pleadings filed in the cause, I make the following findings of fact:

1. I find that on February 26, 1986, for value received, Defendants John T. Crawford and Mary A. Crawford executed and delivered unto Pee Dee Federal Savings and Loan Association in the sum of Thirty-Five Thousand and No/100's (35,000.00) Dollars, together with interest thereon from said date until paid at the rate of Twelve (12%) percent per annum, payable monthly in advance, to be paid in monthly installments of Three-hundred Sixty-Eight and 63/100's Dollars ($368,63) payable on the first day of each calendar month, commencing on the first day of April 1986, and continuing thereafter until the full sum of principal and interest due thereunder has been paid, all of which will be more fully shown by reference to said Promissory Note which was admitted into evidence and identified by Plaintiff's exhibit #1.

2. I further find that in order to better secure the payment of said Promissory Note and in accordance with the terms and conditions thereof, the Defendants John T.

Crawford and Mary A. Crawford made, executed and delivered unto Pee Dee National Savings and Loan Association their certain mortgage, in writing, wherein and whereby they conveyed by way of mortgage the property described therein, being the identical property set forth and described in the Complaint herein; that said mortgage was recorded in the office of the Clerk of Court for Marion County on February 26, 1986, in Real estate Mortgage Book 300, at page 201.

3. I further find that the terms and conditions of said note and mortgage have been broken, the Defendants John T. Crawford and Mary A. Crawford having defaulted in the payments required under the terms of said note and mortgage on October 15, 1990, at which time there was due and owing to the Plaintiff on said note and mortgage the sum of Thirty-five Thousand Three Hundred Forty-two and 70/100's ($35,342.70) Dollars; that interest has occurred on the said indebtedness from the said default from the date of the hearing in the amount of Nine Hundred Forty-five and 11/100's ($945.11) Dollars, and there is now due and owing on said note and mortgage to the plaintiff the sum of Thirty-six Thousand Two Hundred Eighty-seven and 81/100's ($36, 287.81) Dollars, principal and interest to January 10, 1991, with interest thereafter at the rate of $11.73 per diem

4. I further find that said mortgage is , and constitutes, a valid first lien covering said premises.

5. I further find that a Promissory Note held by plaintiff and executed by the Defendants John T. Crawford and Mary A. Crawford provides for the addition of reasonable attorney's fees and cost in the event of default, the plaintiff has occurred the sum of Seventy ($70.00) Dollars as taxable cost prior to the date of this hearing, and that Three Thousand ($3,000.00) Dollars, is a reasonable fee to be allowed to plaintiff's attorney for services rendered and to be rendered in this action.

6. I further find that plaintiff Pee Dee Federal Savings Bank seeks foreclosure of said mortgage in this action and waives its right to deficiency judgment in this action.

7. I further find that the Promissory Note and Real Estate Mortgage made and executed by the Defendants John T. Crawford and Mary A. Crawford in favor of the defendant Marion National Bank constitutes a valid second lien on the subject property, junior in priority only to the lien of Plaintiff's Mortgage; that there is due and owing thereon the sum of Ten Thousand Seven Hundred Forty-three and 88/100's ($10, 743.88) Dollars, principal and interest thereafter at the rate of $3.61 per diem; that the said note and mortgage provide for the addition of reasonable attorney's fees in the event of default or should the note and mortgage be placed in the hands of an attorney for collection and that the sum of Five Hundred ($500.00) Dollars is a reasonable fee for the services of this Defendant's attorney; that the total due and owing to this Defendant as of the date of this hearing is the sum of Eleven Thousand Two Hundred Forty-three and 88/100's ($11, 243.88) Dollars, principal , interest and attorney's fees.

8. I further find the promissory Note and Real Estate Mortgage made and executed by the Defendants John T. Crawford and Mary A. Crawford in favor of the Defendant Pelican Building Centers of Horry-Georgetown, Inc., constitutes a valid third lien on the subject property, junior in priority only to the liens of the mortgage given to the plaintiff and the defendant Marion National Bank, and that there is due and owing thereon the sum of Thirty-four Thousand Two Hundred Fourteen and 28/100's ($34,214.28) Dollars, principal and interest through November 28, 1990, with interest thereafter at the rate of $11.25 per diem.

Upon due consideration of the pleadings, the testimony and the premises, it is

ORDERED, ADJUDGED AND DECREED, that the Plaintiff Pee Dee Federal savings Bank have judgment against the Defendants John T. Crawford and Mary A. Crawford in the amount of Thirty-six Thousand Two Hundred Eighty-seven and 81/100's ($36,287.81) Dollars, principal and interest through January 10, 1991, with interest thereafter at the rate of $11.73 per diem, together with Three Thousand ($3,000.00) Dollars as attorney's fees for the services of the plaintiff's attorney herein, amounting in the whole to the sum of Thirty Eight Thousand Two Hundred Eighty-seven and 81/100's ($39,287.81) [sic.] Dollars, principal, interest and attorney's fees, with interest from and after January 10, 1991, at the rate of $11.73 Dollars per diem. And it is

FURTHER ORDERED, ADJUDGED AND DECREED that the equity of redemption be barred, and the rights of the defendants and all persons claiming by, through or under them be forever ended and barred. And it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the mortgaged lands and premises described in the Complaint be sold at public auction, before the Courthouse rear door, in the City of Marion, Marion County, South Carolina, by the undersigned, as Special Referee, upon the following terms, to wit: For cash to the highest bidder, on sales day in February, 1991, it being the 4th day of the said month, at 12:00 Noon, or on any subsequent convenient sales that thereafter, purchaser to pay for all papers and revenue stamps, and should the successful or highest bidder fail or refuse to comply with his bid, then said land and premises to be resold on the same day or any subsequent convenient sales day there after at the risk of the defaulting bidder, without any further Order of the Court; that the highest bidder, except the Plaintiff, be required to deposit at least 10 (10%) per cent of his bid immediately as evidence of good faith, to be applied as liquidated damages in the event of noncompliance; that the usual due public notice be given by

advertisement for at least three (3) weeks in The Marion Star and Mullins Enterprise, a newspaper published in the City of Marion, State and County aforesaid, stating the time and place of said sale and the terms thereof, and the deficiency judgment not having been demanded, the bidding will not remain open but that immediate compliance may be had; that he execute to the purchaser a Deed to the lands and premises; and that out of the proceeds of such sale, after deducting all lawful costs, expenses, and taxes, the balance shall be paid out first to the plaintiff in the amount as hereinabove found and described, next to the Defendant Marion National Bank in the amount hereinabove described of principal, interest and attorney's fees, next to the Defendant Pelican Building Centers of Horry-Georgetown, Inc., in the amount hereinabove described, with the remainder thereof, if any , to be held pending further Order of the Court; that the purchaser at such sale shall comply with his bid within Twenty (20) days thereof and that a Deed to said lands and premises be executed by the said W. B. Norton, Jr., as Special Referee of Marion County, to the purchaser and that the purchaser be let into possession upon the production of said Deed.

The following is a description of the lands and premises hereinabove mentioned and ordered sold:

All that certain parcel or lot of land lying and being situate on the east side of Henry Street, inside the corporate limits of the City of Marion, Marion County, South Carolina. Said lot being shown and designated as Lot Number 3 on a map of property surveyed for R. W. Vaught, Sr., which said map is recorded in the office of the Clerk of Court for Marion County, South Carolina, in Plat Book 29, at Page 114. Said lot measures 60 feet on its Western boundary whereon it bounds Henry Street; 106.73 feet on its Northern boundary whereon it bounds Lot Number 2 on said map; 60 feet on its Eastern boundary whereon it bounds lands of R. W. Vaught, Sr., and 104.85 feet on its Southern boundary whereon it

bounds lands of R.W. Vaught, Sr.

This being one of those two certain lots of land conveyed to the mortgagors herein by deed of Jonathan D. Dozier Trust dated August 29, 1985, and recorded in the office of the Clerk of Court for Marion County, South Carolina, in Deed Book A-221 at page 295.

S/ W. B. Norton, Jr.,
Special Referee For Marion
County, South Carolina

MARION, SOUTH CAROLINA,
JANUARY 10, 1991.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF MARION	)	90-CP-33-300
	)	JUDGMENT ROLL
PEE DEE FEDERAL SAVINGS BANK,	)	19549-A
	)	AND
PLAINTIFF,	)	
	)	90-CP-33-301
vs.	)	JUDGMENT ROLL
	)	19550-A
JOHN T. CRAWFORD, MARY A. CRAWFORD, AND PELICAN BUILDING CENTERS OF HORRY-GEORGETOWN, INC., D/B/A MYRTLE BEACH COMPANY.	)	AND
	)	90-CP-33-302
	)	JUDGMENT ROLL
	)	19551-A
DEFENDANTS.	)	

ORDER

These three cases are before the court on Motion of the Defendants John T. crawford and Mary A. Crawford to vacate the judgments dated January 10, 1991. A hearing on the Motion was held on Tuesday, October 29, 1991, at 11:00 a.m., at Marion, South Carolina. During the course of said hearing were Brenda Reddix-Smalls, attorney for Defendants John T. Crawford and Mary A. crawford, and John P. Williams, Jr., attorney for Plaintiff.

These three cases were mortgaged foreclosure actions

brought by plaintiff Pee Dee Federal savings Bank to foreclose four real estate mortgages. The foreclosure actions were commenced by the filing of a Summons and Complaint in each case on November 2, 1990. The Defendants crawford did not Answer or otherwise appear and Affidavits of Default were filed. These cases were referred to me, with finality, by Order of Reference dated January 2, 1991, and were heard by me on January 10, 1991. the Defendants Crawford did not appear at the hearings and Judgments were issued on January 10, 1991. The real property describe in the four mortgages was subsequently sold by me on February 4, 1991, with plaintiff being the highest and only bidder

The Defendants Crawford now move the court to have the Judgments of foreclosure and sale vacated pursuant to Rule 60 (b) (5) SCRCP, which provides that the Court

"...may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: ... (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."

The defendants contend that they are entitled to such relief on the grounds that they were not given notice of the date, time and place of hearings. Defendants' attorney also argued, upon the hearing of this motion, that the record did not reflect that plaintiff complied with certain notice requirements set forth in the various real estate mortgages.

present at the hearing on Defendants' motion were the Defendants' attorney, Brenda Reddix-Smalls, and the Defendants John T. crawford and Mary A. Crawford. Also present were William H. Johnson, Jr., Executive Vice President of Plaintiff, and John P. Williams, Jr., attorney for Plaintiff. No testimony or affidavits were submitted by the

defendants in support of their motion. Plaintiff submitted an affidavit of Plaintiff counsel in opposition to Defendant's motion in which it was averred, inter alia, that Plaintiff's counsel gave the Defendants Crawford oral notice of the date, time and place of the hearings. Defendants did not deny any of the averments of plaintiffs affidavit.

FINDINGS OF FACT

From a review of the pleadings, the Decrees of Foreclosure, and the affidavit of plaintiff's counsel submitted in opposition of Defendant's motion, i make the following findings of fact:

1. I find that the Defendants Crawford were properly served with copies of the Summons and Complaint in each of these actions on November 9, 1990; that they failed to appear or file responsive pleadings in response to the requirements of the Summons in each of these cases and thereby made default; that affidavits of default were filed in each of these three actions.

2. I further find that the Complaints herein set forth with particularity the amount of indebtedness due the Plaintiff under each of the four promissory notes and real estate mortgages and, in addition thereto, sought to recover the cost incurred by plaintiff in the foreclosure actions, including "reasonable attorneys fees".

3. I further find that the Defendants Crawford had actual knowledge of the date, time, and place of the hearings, having been so informed by Plaintiff's attorney two or three days prior to hearing, but did not appear.

4. I further find that hearings were held in each of these three cases on January 10, 1991, which resulted in the issuance of decrees of foreclosure dated January 10, 1991; that pursuant to the said decrees, the subject properties were subsequently sold by me on February 4, 1991, with plaintiff

being the highest and only bidder; that deeds to the subject properties were duly issued to plaintiff.

CONCLUSION OF LAW

A party who does not respond to the requirements of a Summons and makes default is deemed to have admitted all well pled facts of the Complaint. Gadsden vs. Home Fertilizer & Chemical Company 89 S.C. 483, 72 S.E. 15 (1911), Rule 8(d) SCRCP. These Defendants did not answer or otherwise plead in response to the requirements of the Summons and Complaints. By failing to do so, they admitted all well pled facts alleged in the Complaints and waived any defenses they may have had.

defendants argue that they are entitled to have the judgments vacated on the grounds that they were not given notice of the date, time, and place of hearing. they argue that they were entitled to such notice under Rule 5(A) SCRCP because, even though they were in default, the Complaints set forth claims for unliquidated damages. Each of the Complaints set forth the indebtedness of principal and interest due under each of the notes and mortgages as of October 15, 1990, and alleged that Plaintiff was entitled to interest from said date at the interest rates provided in the various notes, plus all costs of the various actions, as well as "reasonable attorneys fees" in each of these actions constituted claims for unliquidated damages. Rule 71 SCRCP provides, inter alia, that "only parties who have appeared and filed pleadings in the action shall be entitled to the usual notice of hearings and other proceedings unless the pleadings state an unliquidated claim." Defendants rely on dicta in the case of Peoples Federal Savings & Loan Association vs. Graham, 291 S>C> 178, 352 S. E. 2nd 511 (ct. App. 1987) , for the proposition that the claims for reasonable attorney's fees in these actions constitute unliquidated claims. A claim is liquidated if the

sum claimed is certain or capable of being reduced to a certainty. Dibble v. Sumter Ice & Fuel Company, 283 S. C. 278, 322 S. E. 2nd 674 (ct. App. 1984). The threshold question is whether plaintiff's complaints set forth unliquidated claims, so as to require notice of the hearings under SCRCP 5(A). It appears to the Court that the Complaints in these actions set forth liquidated claims. The amount of indebtedness owed was set forth with particularity and constituted sums capable of being reduced to a certainty, as required by Dibble. The claims for reasonable attorney's fees were, in the opinion of the Court, merely incidental to the foreclosure claims and do not justify characterization of the Complaints and constituting unliquidated claims. Thus, not having appeared and filed responsive pleadings, the Crawfords were not entitled to any notice of the hearings, under Rule 71. even if these Defendants were entitled to notice of the hearings, it is undisputed that they were given oral notice of the date, time and place of the hearings in these three actions. Nevertheless, they elected not to attend the hearings. Rule 5(A) is silent to the manner of notice of a hearing in a default situation involving unliquidated damages. Even if the Defendants were entitled to notice of the hearings in some different manner, this Court will not vacate or modify its judgments because of any defect or error in the proceedings which does not affect the substantial rights of the parties. Rule 61 SCRCP. In as much as the Defendants Crawford admittedly had actual notice of the date, time, and place of the hearings, the Court finds that their failure to receive notice by some other method did not effect their substantial rights and on the ground alone their motion should be denied.

The defendants also argued that the record did not reflect compliance on the part of the Plaintiff with certain notice requirements of the mortgages. These are questions which should have been raised by timely Answers to the

Complaints. In order to raise those questions at this time , it appears to the Court that the defendants would have to seek relief from the default judgments rendered against them pursuant to Rule 60(b) (1) SCRCP, which provides for relief from a judgment because of mistake, inadvertence, surprise, or excusable neglect. The Defendants have not so moved the court and have not established the right to be so relieved. For such relief, they must establish mistake, inadvertence, surprise, or excusable neglect, and the existence of a meritorious defense. Thompson v. Hommond 382 S. E. 2nd 900, 299 S.C. 116 (1989). No showing whatsoever was made by Defendants as to mistake, inadvertence, surprise, or excusable neglect, nor was there any evidence to indicate that the defendants have a meritorious defense. The arguments of the mortgages are thus without merit.

During the hearing on this motion, I informed Defendants and their attorney regarding a transaction between my son, William B. Norton, III, and the Plaintiff, Pee Dee Federal Savings Bank. William B. Norton, III borrowed the sum of $50,000.00 from Plaintiff for the purpose of buying a lot near Murrells Inlet in Georgetown County, South Carolina. Since he planned to move a house onto the lot and refurbish it, his transaction presented an unusual situation for the bank, and additional collateral was required during the construction period. In order to facilitate the financing, I gave to plaintiff a real estate mortgage on my residence in Marion County, with the agreement that once the Murrells Inlet home was completed and appraised my property would be released. Additionally, Plaintiff's attorney in this action, John P. Williams, Jr., represented my son at closing, although he was not involved in the examination of the Murrells Inlet property. This information was related to Defendants' counsel so that Defendants would be fully informed thereabouts. Defendants' counsel moved for recusal upon learning of the existence of this transaction.

I am especially concerned about allowing even the appearance of impropriety and/or appearing to be anything other than completely impartial. While I am convinced of my ability to be completely impartial in this matter, it was because of my concerns regarding appearances that this information was related to Defendants and their attorney. Additionally, my concerns in this regard were related, through Plaintiff's attorney, to the presiding circuit court judge, to present an opportunity for the appointment of a Substitute Special Referee or any other action he might feel necessary. I was not so replaced and in as much as this case was referred to me with finality, I feel that any decision on the motion for recusal must be made in the interest of justice and to protect the interests of both parties. these cases are over one year old, and the motion to vacate has been pending for at least six months. Additional delay certainly would not serve the ends of justice. Therefore, while I might prefer that some other Judge hear and rule on this motion, I can only decline if required by law. the Code of Judicial Conduct, found in Appellate Court Rule 501, does not, in my opinion, require recusal in this situation. To suggest that any kind of financial relationship constitutes grounds for recusal goes far beyond both the Canons of Judicial Conduct and the requirements for proper administration of justice. It is for that reason that the Canons of Judicial Conduct do not require recusal under every circumstance. Canon 3C(1) states that a Judge should disqualify himself in any proceeding in which his impartiality might be reasonably questioned, and goes on to enumerate a nonexclusive list of instances in which a Judge should disqualify himself, principally where he or some member of his family might have or appear to have some interest in the outcome. It is my opinion that the circumstances surrounding this transaction with the Plaintiff do not warrant recusal and that the Defendants' motion should be denied. It is therefore

ORDERED, that the motion of the Defendants John T. Crawford and Mary A. Crawford to vacate the judgments in the within actions is denied; and it is

ORDERED, that Defendants' motion for recusal is denied.

AND IT IS SO ORDERED.

December 4, 1991 s/ W. B. Norton, Jr.
Special Referee

Marion, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

Pee Dee Federal Savings Bank,. . . Respondent,

v.

John T. Crawford and Mary A. Crawford,. . . .
. . . . . Appellants.

Appeal from Marion County
W. B. Norton, Jr., Special Referee

Unpublished Opinion No. 93-UP-179
Submitted May 10, 1993 - Filed June 14, 1993

AFFIRMED

Brenda Reddix-Smalls, of Columbia, for appellants.

John P. Williams, of Marion, for respondent.

PER CURIUM: Pee Dee Federal savings Bank brought actions to foreclose four mortgages on real estate given by John T. Crawford and Mary A. Crawford to secure repayment of loans made by the bank. The Crawfords did not file an Answer or other responsive pleading in any of the cases. The matter was referred to a special referee for hearing and entry of final judgment. A hearing was set and

held. The Crawfords did not appear at the hearing. The special referee issued a decree of foreclosure and sale of the property was duly sold. After the sale, the Crawfords moved to vacate the judgment of foreclosure on the ground that they were not given written notice of the foreclosure hearing. The special referee heard and denied the motion. The Crawfords appeal. We affirm.

The record reflects that the Crawfords did not receive the written notice of hearing prescribed by Rule 5 (a), SCRCP. However, the record shows the Crawfords had actual knowledge of the date, time and place of the foreclosure hearing, but, for whatever reason, did not appear. On these facts, the familiar law that "no one needs notice of what he already knows" applies. See Walker v. Preacher, 185 SC 124, 128, 367 S. E. 2d 430, 433 (ct. App. 1988). Accordingly, we affirm the special referee's order denying the motion to vacate the judgment. In view of this disposition, we need not address the other issues raised by the appeal.

AFFIRMED.

_____, J.

_____, J.

_____, A. J.

THE SOUTH CAROLINA COURT OF APPEALS

Pee Dee Federal Savings Bank, ... Respondent,

v.

John T. Crawford, ...Appellants.

ORDER

After careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principal of law has been either overlooked or disregarded, and hence, there is no ground for a rehearing. It is therefore ordered that the petition for Rehearing be denied.

_____, J.

_____, J.

_____, A. J.

Columbia, South Carolina
September 8, 1993.

THE SUPREME COURT OF SOUTH CAROLINA

September 22, 1994

Mr. John T. Crawford
Ms. Mary A. Crawford
P. O. Box 474
Rains, S. C. 29589

Re: Pee Dee Federal Savings Bank vs. John T. Crawford and Mary A. Crawford, et al.

Dear Mr. and Ms. Crawford:

The Court has issued the following Order on your Petition for a Writ of Certiorari in the above entitled matter:

"Petition for Writ of certiorari denied.

S/ A. Lee Chandler C. J.
For the Court
Associate Justice John H. Waller, not participating

September 22, 1994."

Please advise the Court of what disposition you would have us make of the extra copy of record in this matter. If we have not heard from you to the contrary, we will destroy the record on October 3, 1994.

Very truly yours,

S/ Brenda F. Shealy

DEPUTY CLERK

BFS/dmh

Copy to: John P. Williams, Esquire
The Honorable Kenneth Richstad
The Honorable Martha Saxon
West Publishing Company

FILED
JAN 25 1995

(2)

No. 94-1157

In The
SUPREME COURT of the UNITED STATES
October Term, 1994

PEE DEE FEDERAL SAVINGS BANK,

Respondent,

v.

JOHN T. CRAWFORD AND MARY A. CRAWFORD,

Petitioners,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION FOR RESPONDENT

John P. Williams, Jr.
Counsel of Record
Hooks and Williams, Attorneys
PO Box 883
Marion, South Carolina 29571
(803) 423-7630

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54 pp

COUNTER STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Does the failure to give formal written notice of a mortgage foreclosure hearing to mortgagors in default who have actual knowledge of the date, time, and place of the hearing violate the mortgagors' rights of due process under the Fifth and Fourteenth Amendments of the United States Constitution?

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No. 94-1157

In The

SUPREME COURT of the UNITED STATES

October Term, 1994

PEE DEE FEDERAL SAVINGS BANK,

Respondent,

v.

JOHN T. CRAWFORD AND MARY A. CRAWFORD,

Petitioners,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION FOR RESPONDENT

OPINIONS AND JUDGMENTS BELOW

The Decree of Foreclosure of the Court of Common Pleas dated January 10, 1991, was not published but is found in the appendix to the Petition for Writ of Certiorari, at App. 1.

The Order of the Court of Common Pleas denying Petitioners' Motion to Vacate Judgment, dated December 4, 1991, was not published. It was included in the appendix to the Petition for Writ of Certiorari. Due to typographical errors in the Petition, it is reprinted in the appendix hereto, at Appendix 1-11, infra.

The opinion and judgment of the South Carolina Court of Appeals dated June 14, 1993, was not published. It was included in the appendix to the Petition for Writ of Certiorari. Due to typographical errors in the Petition, it is reprinted in the appendix hereto, at Appendix 12-14, infra.

STATEMENT OF THE CASE

This appeal arises out of three real estate mortgage foreclosure actions commenced by Respondent on November 6, 1990. The Petitioners, makers of the promissory notes and real estate mortgages involved, were personally served with copies of the Summons and Complaint in each of the actions, but did not answer or otherwise appear in compliance with the requirements of the Summons. After Petitioners made default, the matters were referred to a Special Referee for hearings to be held January 10, 1991. No written notice of the date, time, and place of the hearings before the Special Referee was provided to the Petitioners. Respondent's attorney orally notified Petitioners about the scheduled hearings several days beforehand when Petitioners came to his office to discuss the possibility of reinstating the loans.

The Petitioners did not appear at the hearings before the Special Referee and decrees of foreclosure were issued in each of the three cases. Pursuant to the decrees of foreclosure, the properties involved were sold by the Special Referee on February 4, 1991. Thereafter, on April 24, 1991, Petitioners filed a Motion to Vacate Judgment on the grounds that

Petitioners had not received notice of the foreclosure hearings arguably required under South Carolina Rules of Civil Procedure Rule 5(a). The Special Referee denied Petitioners' Motion to Vacate Judgement, finding that Petitioners had actual knowledge of the date, time, and place of the mortgage foreclosure hearings. He further found that the mortgage foreclosure complaints set forth claims for liquidated damages only, and thus, under the South Carolina Rules of Civil Procedure, Respondent was not required to give Petitioners notice of the hearings.

Petitioners noticed an appeal from the Order of the Special Referee and the South Carolina Court of Appeals issued its opinion affirming the lower Court decision. After petitioning the Court of Appeals for rehearing, Petitioners then petitioned the South Carolina Supreme Court for Writ of Certiorari, which was denied. The petition before this Court followed.

Petitioners make certain factual statements in their statement of the case which are both untrue and unsupported by the record. They claim that Respondent bank did not notify them of the delinquency prior to beginning the foreclosure suit, that they visited the bank within thirty days after the service of

the Summons and Complaint upon them, and that they made numerous attempts to negotiate with the bank and to reinstate their loans. These factual allegations are wholly unsupported by the record. There is no testimony or other form of evidence, nor is there any averment in any affidavit, to support these misstatements of fact. Further, while Petitioners assert that they were not given notice of the date, time, and place of the foreclosure hearing, they have never presented any testimony or other evidence to support that contention. The trial court made a factual finding that Petitioners had actual knowledge of the hearing schedule. This finding of fact was based upon uncontroverted evidence in the record before the trial judge, and no appeal therefrom was taken. These misstatements of fact are called to the attention of the Court pursuant to Supreme Court Rule 15.1. If uncontroverted, these statements might tend to indicate that the foreclosure proceedings were conducted almost in secret, while the Petitioners were diligently seeking information from Respondent and attempting to correct their delinquency.

SUMMARY OF ARGUMENT

The Petition for Certiorari should be denied for failure of jurisdiction. The issue presented by the Petition under the facts and circumstances of this case is not a substantial federal question. Furthermore, the issue has not been presented to the State Courts below, either at the Trial or at the Appellate level. In any event, the decisions below are plainly supported by adequate state law grounds.

ARGUMENT

This Petition for Writ of Certiorari should be denied by the Court. The jurisdiction of this Court to review State Court decisions, as established by statute and defined by various decisions of the Court, is limited to those cases in which a substantial Federal question has been presented to and ruled upon by the State Courts. The jurisdiction of this Court has been interpreted to exclude jurisdiction in those cases where the decision is based upon adequate state law grounds. Respondent contends that this petition fails all of these jurisdictional tests. It

fails to present a substantial federal question, it fails to present a federal question which has been presented to and ruled upon by the State Courts below, and the State Court rulings below are clearly supported by adequate state law grounds.

I. THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Petitioners wish to characterize this case as one involving failure of notice. However, the record, as well as the opinion of the South Carolina Court of Appeals, reflects that the issue is not one of failure of notice, but one of form of notice. It is undisputed in the record that Petitioners were given oral notice of the foreclosure hearings.[1]

As outlined in the Statement of the Case, Petitioners were defendants in several mortgage foreclosure actions. After being served with the Summons and Complaint in each of the actions, they did not answer or otherwise plead and thus made

[1] see Order Denying Motion, Appendix pp. 1-10, at pp. 3 and 4.

default. The various cases were referred to a Special Referee and hearings were scheduled. No written or formal notice of the hearing schedule was provided to Petitioners. Coincidentally, Petitioners came to the office of Respondent's counsel to discuss the possibility of reinstating the loan two or three days prior to the hearings and, at that time, were advised of the hearing schedule. Petitioners chose not to attend the foreclosure hearings and Decrees of Foreclosure were issued by the Special Referee directing that the property be advertised and sold.

Under state procedural law, by making default the Petitioners are deemed to have admitted all of the allegations of the Complaints. *South Carolina Rules of Civil Procedure*, Rule 8(d). Had they appeared at the foreclosure hearings, their participation would have been limited to cross-examination of witnesses as to damages. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d, 880. (1978). As they could not dispute the admitted allegations, they could not dispute the amount of principal and interest owed. One measure of the "substantialness" of a federal question is the impact that the

decision on the federal question has on the ultimate outcome. In the case before the Court, Respondent contends that that impact is minimal.

The federal question raised by Petitioners on these facts and circumstances is whether or not mortgagors who are in default have a constitutional right to receive written notice of a hearing when they actually know the hearing schedule. Such a narrow question, with minimal impact, does not present a substantial federal question.

II. THE FEDERAL QUESTION RAISED IN THE PETITION HAS NOT BEEN PRESENTED TO THE STATE COURTS

This Court has repeatedly held that where Petitioners for Certiorari have failed to raise their federal claims in state proceedings, this Court is without jurisdiction in the case. *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, (1981); 28 *U.S.C.* Sec. 1257. Supreme Court Rule 14(h) requires a Petitioner's statement of the case to specify the stage in the proceedings at

which the federal questions were raised, etc. Respondent submits that Petitioners have failed to comply with Rule 14(h) and are in fact unable to comply with this rule because the federal question raised in their Petition was never presented to the State Courts. As stated above, Petitioners made default and thus did not initially present the federal question or any other defense. Neither the Motion to Vacate[2], nor the transcript of the hearing on the Motion to Vacate[3], contain any reference, direct or indirect, to the federal procedural due process issue raised in the Petition for Certiorari. Likewise, the Order of the trial Court denying the Motion to Vacate contains no reference to any federal issues, either in its statement of the issues before it or in its rulings.[4] The record establishes that the procedural due process claim presented in the Petition before this Court was not presented to the Trial Court.

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[2] see Motion to Vacate, Appendix p. 13

[3];see Transcript of Hearing, Appendix pp. 14-33.

[4] see Order Denying Motion, Appendix pp. 2-3, and 5-9.

The South Carolina Court of Appeals opinion does not mention any federal question or issue.[5] This Court has stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Webb*, supra; *Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360 (1969); Nowhere in the Petition for Certiorari do the Petitioners make any explanation for the failure of the Court of Appeals to mention the federal question. While Petitioners' brief to the South Carolina Court of Appeals is not before this Court, nowhere therein is there any reference to any federal issue. The Petition for Rehearing presented to the South Carolina Court of Appeals, reprinted in the appendix, does not raise or present any federal questions.[6] There is nothing in the record to show that the federal issue was presented to the State Appellate Courts.

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[5] see Opinion of Court of Appeals, Appendix pp. 11-12.
[6] see Petition for Rehearing, Appendix pp.34-36.

The relevant jurisdictional statute is 28 *U.S.C.* Sec. 1257, which requires the Petitioners to have "specially set up or claimed under the Constitution ... of the United States" the right or privilege which they now seek to have this Court enforce. The record of the lower Court proceedings, at both trial and appellate levels, is devoid of any reference to the Federal Constitutional issues raised in the Petition. Petitioners have simply not presented any federal questions to the State Courts. "It is a long-settled rule that the jurisdiction of this Court to reexamine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb*, supra; *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 63, (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655, 17 S.Ct. 709, 711, (1897). The federal issues not having been raised in the Court below, this Court is without jurisdiction to review the State Court decisions and the petition should be denied.

III. THE STATE COURT DECISION IS BASED UPON ADEQUATE STATE LAW GROUNDS

The opinion of the South Carolina Court of Appeals is based upon a long standing rule of state law, evidenced by the two cases cited therein. The application of this rule was dispositive of the case, making it unnecessary for the Court of Appeals to consider any other issues. This Court has repeatedly held that decisions grounded on adequate state law grounds will not be reviewed even if a substantial federal question is involved. *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793 (1990); *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476-77, (1983). It is clear that the opinion below is based on adequate state law grounds and thus should not be disturbed.

CONCLUSION

The question raised in the Petition has not been presented to or ruled upon by the Courts below. The State

Court decisions are clearly supported by adequate state law grounds and the issue before the Court is a state law question. For the reasons stated above, Respondent respectfully requests that the Petition of Writ of Certiorari herein be denied

Respectfully submitted.

John P. Williams, Jr.
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Appendix 1

STATE OF SOUTH CAROLINA,	)	IN THE COURT OF
	)	COMMON PLEAS
	)	
COUNTY OF MARION.	)	
Pee Dee Federal Savings Bank,	)	90-CP-33-300
	)	Judgment Roll 19549-A
Plaintiff,	)	
	)	AND
vs.	)	
	)	90-CP-33-301
John T. Crawford, Mary A.	)	Judgment Roll 19550-A
Crawford, and Pelican	)	
Building Centers of Horry-	)	AND
Georgetown, Inc., d/b/a	)	
Myrtle Beach Company.	)	90-CP-33-302
	)	Judgment Roll 19551-A
Defendants.	)	
	)	

ORDER

These three cases are before the court on Motion of the Defendants John T. Crawford and Mary A. Crawford to vacate the Judgments dated January 10, 1991. A hearing on the Motion was held on Tuesday, October 29, 1991, at 11:00 a.m., at Marion, South Carolina. During the course of said hearing, Defendants' attorney also orally moved the Court for recusal. Appearing at said hearing were Brenda Reddix-Smalls, attorney for Defendants John T. Crawford and Mary A. Crawford, and John P. Williams, Jr., attorney for Plaintiff.

These three cases were mortgage foreclosure actions brought by Plaintiff Pee Dee Federal Savings Bank to foreclose four real estate mortgages. The foreclosure actions were commenced by the filing of a Summons and Complaint in each case on November 2, 1990. The Defendants Crawford did not answer or otherwise appear and Affidavits of Default were filed. These cases were referred to me, with finality, by Order of Reference dated January 2, 1991, and were heard by me on January 10, 1991. The Defendants Crawford did not appear at the hearings and Judgments were issued on January 10, 1991. The real property described in the four mortgages was subsequently sold by me on February 4, 1991, with Plaintiff being the highest and only bidder.

The Defendants Crawford now move the court to have the judgments of foreclosure and sale vacated pursuant to Rule 60(b)(5) SCRCP, which provides that the Court

> "...may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."

The Defendants contend that they are entitled to such relief on the grounds that they were not given notice of the date, time and place of the hearings. Defendants' attorney also argued, upon the hearing of this motion, that the

record did not reflect that Plaintiff complied with certain notice requirements set forth in the various real estate mortgages.

Present at the hearing on Defendants' motion were the Defendants' attorney, Brenda Reddix-Smalls, and the Defendants John T. and Mary A. Crawford. Also present were William H. Johnson, Jr., Executive Vice-President of Plaintiff, and John P. Williams, Jr., attorney for Plaintiff. No testimony or affidavits were submitted by the Defendants in support of their motion. Plaintiff submitted an affidavit of Plaintiff's counsel in opposition to Defendant's motion in which it was averred, inter alia, that Plaintiff's counsel gave the Defendants Crawford oral notice of the date, time, and place of the hearings. Defendants did not deny any of the averments of Plaintiff's affidavit.

FINDINGS OF FACT

From a review of the pleadings, the Decrees of Foreclosure, and the affidavit of Plaintiff's counsel submitted in opposition to Defendant's motion, I make the following findings of fact:

1. I find that the Defendants Crawford were properly served with copies of the Summons and Complaint in each of these actions on November 9, 1990; that they failed to appear or file responsive pleadings in response to the requirements of the Summons in each of these cases and

thereby made default; that affidavits of default were filed in each of these three actions.

2. I further find that the Complaints herein set forth with particularity the amount of indebtedness due the Plaintiff under each of the four promissory notes and real estate mortgages and, in addition thereto, sought to recover the costs incurred by Plaintiff in the foreclosure actions, including "reasonable attorneys fees".

3. I further find that the Defendants Crawford had actual knowledge of the date, time, and place of the hearings, having been so informed by Plaintiff's attorney two or three days prior to the hearing, but did not appear.

4. I further find that hearings were held in each of these three cases on January 10, 1991, which resulted in the issuance of decrees of foreclosure dated January 10, 1991; that pursuant to the said decrees, the subject properties were subsequently sold by me on February 4, 1991, with Plaintiff being the highest and only bidder; that deeds to the subject properties were duly issued to Plaintiff.

CONCLUSIONS OF LAW

A party who does not respond to the requirements of a Summons and makes default is deemed to have admitted all well pled facts of the

Complaint. Gadsden vs. Home Fertilizer & Chemical Company 89 S.C. 483, 72 S.E. 15 (1911), Rule 8(d) SCRCP. The failure to raise possible defenses or claims in a timely manner constitutes a waiver of same. Rule 12(b) SCRCP. These Defendants did not answer or otherwise plead in response to the requirements of the Summons and Complaints. By failing to do so, they admitted all well pled facts alleged in the Complaints and waived any defenses they may have had.

Defendants argue that they are entitled to have the judgments vacated on the grounds that they were not given notice of the date, time, and place of the hearing. They argue that they were entitled to such notice under Rule 5(A) SCRCP because, even though they were in default, the Complaints set forth claims for unliquidated damages. Each of the Complaints set forth the indebtedness of principal and interest due under each of the notes and mortgages as of October 15, 1990, and alleged that Plaintiff was entitled to interest from said date at the interest rates provided in the various notes, plus all costs of the various actions, as well as reasonable attorneys fees. The Defendants contend that the Plaintiff's claims for "reasonable attorneys fees" in each of these actions constituted claims for unliquidated damages. Rule 71 SCRCP provides, inter alia, that "only parties who have appeared and filed pleadings in the action shall be entitled to the usual notice of hearings and

other proceedings unless the pleadings state an unliquidated claim." Defendants rely on dicta in the case of Peoples Federal Savings & Loan Association vs. Graham, 291 S.C. 178, 352 S.E.2d 511 (Ct. App. 1987), for the proposition that the claims for reasonable attorney's fees in these actions constitute unliquidated claims. A claim is liquidated if the sum claimed is certain or capable of being reduced to a certainty. Dibble V. Sumter Ice & Fuel Company, 283 S.C. 278, 322 S.E.2d 674 (Ct. App. 1984). The threshold question is whether Plaintiff's Complaints set forth unliquidated claims, so as to require notice of the hearings under SCRCP 5(A). It appears to the Court that the Complaints in these actions set forth liquidated claims. The amount of the indebtedness owed was set forth with particularity and constituted sums capable of being reduced to a certainty, as required by Dibble. The claims for reasonable attorney's fees were, in the opinion of the Court, merely incidental to the foreclosure claims and do not justify characterization of the Complaints as constituting unliquidated claims. Thus, not having appeared and filed responsive pleadings, the Crawfords were not entitled to any notice of the hearings, under Rule 71. Even if these Defendants were entitled to notice of the hearings, it is undisputed that they were given oral notice of the date, time and place of the hearings in these three actions. Nevertheless, they elected not to attend the hearings. Rule

5(A) is silent as to the manner of giving notice of a hearing in a default situation involving unliquidated damages. Even if the Defendants were entitled to notice of the hearings in some different manner, this Court will not vacate or modify its judgments because of any defect or error in the proceedings which does not affect the substantial rights of the parties. Rule 61 SCRCP. In as much as the Defendants Crawford admittedly had actual notice of the date, time, and place of the hearings, the Court finds that their failure to receive notice by some other method did not effect their substantial rights and on that ground alone their motion should be denied.

The Defendants also argued that the record did not reflect compliance on the part of Plaintiff with certain notice requirements of the mortgages. These are questions which should have been raised by timely Answers to the Complaints. In order to raise those questions at this time, it appears to the Court that the Defendants would have to seek relief from the default judgments rendered against them pursuant to Rule 60(b)(1) SCRCP, which provides for relief from a judgment because of mistake, inadvertence, surprise, or excusable neglect. The Defendants have not so moved the Court and have not established the right to be so relieved. For such relief, they must establish mistake, inadvertence, surprise, or excusable neglect, and the existence of a meritorious defense. Thompson V. Hammond 382 S.E.2d

900, 299 S.C. 116 (1989). No showing whatsoever was made by Defendants as to mistake, inadvertence, surprise, or excusable neglect, nor was there any evidence to indicate that the Defendants have a meritorious defense. The arguments regarding Plaintiff's failure to comply with notice requirements of the mortgages are thus without merit.

During the hearing on this motion, I informed Defendants and their attorney regarding a transaction between my son, William B. Norton, III, and the Plaintiff, Pee Dee Federal Savings Bank. William B. Norton, III borrowed the sum of $50,000.00 from Plaintiff for the purpose of buying a lot near Murrells Inlet in Georgetown County, South Carolina. Since he planned to move a house onto the lot and refurbish it, his transaction presented an unusual situation for the Bank, and additional collateral was required during the construction period. In order to facilitate the financing, I gave to Plaintiff a real estate mortgage on my residence in Marion County, with the agreement that once the Murrells Inlet home was completed and appraised my property would be released. Additionally, Plaintiff's attorney in this action, John P. Williams, Jr., represented my son at closing, although he was not involved in the examination of the Murrells Inlet property. This information was related to Defendants' counsel so that Defendants would be

fully informed thereabouts. Defendants' counsel moved for recusal upon learning of the existence of this transaction.

I am especially concerned about allowing even the appearance of impropriety and/or appearing to be anything other than completely impartial. While I am convinced of my ability to be completely impartial in this matter, it was because of my concerns regarding appearances that this information was related to Defendants and their attorney. Additionally, my concerns in this regard were related, through Plaintiff's attorney, to the presiding circuit court judge, to present an opportunity for the appointment of a substitute Special Referee or any other action he might feel necessary. I was not so replaced and in as much as this case was referred to me with finality, I feel that any decision on the motion for recusal must be made in the interest of justice and to protect the interests of both parties. These cases are over one year old, and the motion to vacate has been pending for at least six months. Additional delay certainly would not serve the ends of justice. Therefore, while I might prefer that some other Judge hear and rule on this motion, I can only decline if required by law. The Code of Judicial Conduct, found in Appellate Court Rule 501, does not, in my opinion, require recusal in this situation. To suggest that any kind of financial relationship constitutes grounds for recusal goes far beyond both the requirements of the Canons of

Judicial Conduct and the requirements for proper administration of justice. It is for that reason that the Canons of Judicial Conduct do not require recusal under every circumstance. Canon 3C(1) states that a Judge should disqualify himself in any proceeding in which his impartiality might be reasonably questioned, and goes on to enumerate a nonexclusive list of instances in which a Judge should disqualify himself, principally where he or some member of his family might have or appear to have some interest in the outcome. It is my opinion that the circumstances surrounding this transaction with the Plaintiff do not warrant recusal and that the Defendants' motion should be denied. It is therefore

ORDERED, that the motion of the Defendants John T. Crawford and Mary A. Crawford to vacate the judgements in the within actions is denied; and it is

FURTHER ORDERED, that Defendants' motion for recusal is denied.

AND IT IS SO ORDERED.

December 4, 1991 /s

W. B. Norton, Jr.,

Marion, South Carolina Special Referee

Appendix 11

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

Pee Dee Federal Savings Bank, . . . Respondent,

v.

John T. Crawford and Mary A. Crawford, ...
. . . . . Appellants.

Appeal from Marion County
W. B. Norton, Jr., Special Referee

Unpublished Opinion No. 93-UP-179
Submitted May 10, 1993 - Filed June 14, 1993

AFFIRMED

Brenda Reddix-Smalls, of Columbia, for appellants.

John P. Williams, of Marion, for respondent.

PER CURIAM: Pee Dee Federal Savings Bank brought actions to foreclose four mortgages on real estate given by John T. Crawford and Mary A. Crawford to secure repayment of loans made by the Bank. The Crawfords did not file an answer or other responsive pleading in any of the cases. The matter was referred to a special referee for hearing and entry of final judgment. A hearing was set and held. The Crawfords did

not appear at the hearing. The special referee issued a decree of foreclosure and sale and the property was duly sold. After the sale, the Crawfords moved to vacate the judgment of foreclosure on the ground that they were not given written notice of the foreclosure hearing. The special referee heard and denied the motion. The Crawfords appeal. We affirm.

The record reflects that the Crawfords did not receive the written notice of hearing prescribed by Rule 5 (a), SCRCP. However, the record also shows the Crawfords had actual knowledge of the date, time, and place of the foreclosure hearing, but, for whatever reason, did not appear. On these facts, the familiar law that "no one needs notice of what he already knows" applies. See *Walker v. Preacher*, 185 S.C. 462, 467, 194 S.E. 868, 870 (1938); *Dicks & Gillam, Inc. v. Cleland*, 295 S.C. 124, 128, 367 S.E.2d 430, 433 (Ct. App. 1988). Accordingly, we affirm the special referee's order denying the motion to vacate the judgment. In view of this disposition, we need not address the other issues raised by the appeal

AFFIRMED

/sJohn P Gardner , J.

/sRandall T. Bell , J.

/sBruce Littlejohn , A.J.

Appendix 13

MOTION TO VACATE JUDGEMENT
(Caption Omitted)

TO: JOHN WILLIAMS, ATTORNEY FOR THE PLAINTIFF, PEE DEE FEDERAL SAVINGS BANK AND DEFENDANT'S (LIST)

PLEASE TAKE NOTICE that the Defendants, John T. and Mary A. Crawford, through their undersigned attorney, will move before the presiding Judge for the Court of Common Pleas for Marion County in the Marion County Courthouse at 10:00 a.m. on the tenth (10th) day after service hereof, or at such time and place as is convenient to the to the Court and counsel, as follows: That the Defendant be granted an Order vacating the Judgment issued by the Special Referee, W.B. Norton, Jr., on January 10, 1991, and Judgment Roll entered on January 14, 1991, as adopted by the Court of Common Pleas for Marion County in the above encaptioned cases; pursuant to Circuit Court Rule 60(B)(5) and Peoples Federal Savings and Loan Association vs Graham, 352 S.E. 2d 511 (S.C. App. 1987).

Said Motion is based on the reason that the Defendants were not given notice of the foreclosure hearing as required by South Carolina Circuit Court Rule 5(A); further the pleadings, testimony, and Judgment Orders in these matters support theDefendants position.

Appendix 14

TRANSCRIPT OF HEARING
MOTION TO VACATE JUDGEMENT
October 29, 1991

THE COURT: I have brought with me ... is everybody ready to proceed?

MS. REDDIX-SMALLS: Yes, sir.

MR. WILLIAMS: The plaintiff's ready, Your Honor.

THE COURT: I have brought with me judgment rolls number 19549A, 19550A, 19551A from the Clerk of Court's office. The only one of those judgment rolls which has any current ... currently filed papers in it is the 19549A, which is Pee Dee Federal Savings against John C. Crawford and Mary Crawford and others and it's a foreclosure of a lot on Henry Street which is shown in plat book 29 and page 114A. The latest paper filed in this is a Motion to Vacate Judgment addressed to Mr. Williams at Pee Dee Federal Savings and a list of the other defendants in which Ms. Brenda Smalls says she'll move before the Presiding Judge at 10:00 on the tenth .(10th) day after service of this Motion to Vacate the Judgment and the motion is made pursuant to Circuit Court Rule 60(b)(5) and the case of Pee Dee ... of Peoples Federal Savings against Graham at 352 S.E.2d page 511 (S.C. App. 1987). That motion is brought for the reason that the defendants were not given notice of the foreclosure hearing as required by Circuit Court Rule 5(a) and the further reason that the entire

judgment roll supports the defendants' position, whatever that might be. Now, Ms. Smalls, since you're the moving party, I'll let you get us up to date here. I might say that also that that notice was mailed to all the defendants and also that there is an Affidavit filed here by ..- an Affidavit of Mr. Williams in which he states that these defendants did have actual notice of the date of the hearing on the foreclosure Complaint several days before the hearing was held and I am informed that that Affidavit has been served on the attorney for the defendants, is that correct?

MS. REDDIX-SMALLS: That's correct, Your Honor.

THE COURT: All right, I'll here from you now then.

MS. REDDIX-SMALLS: Your Honor, I am Brenda Reddix-Smalls- I represent the defendants, John Crawford and Mary Crawford, and the Motion to Vacate the Judgment is applied to docket numbers 90-CP-33-300, 301 and 302, which would include those ... "all those pieces of property that were foreclosed in this action. That is on the caption of my Motion to Vacate. I assume that the Clerk of Court simply stuck it in one file. And the Affidavit by Mr. Williams also indicates the three different docket numbers, 300, 301 and 302. This matter was originally initiated by the filing of a Summons and Complaint which was filed November 6, 1990, in that there was a prayer for a foreclosure on four different pieces

of property owned by the defendants which a mortgage was held by the plaintiffs. The first piece, the monthly payments was $369.05; the second piece was $368.63; the third piece was $368.63; and the fourth piece was $213.00. The mortgage was made a part of the record. There was an Order of reference dated January 2nd, 1991, in which it was referred to the Honorable Norton. There was a hearing scheduled. Prior to the hearing being scheduled, the Crawfords did not answer the Summons and Complaint by the documents as noted or authorized in our State Court. They did make contact with Mr. Williams, but they did not answer. The hearing which was held, which was part of the defendants' Motion to Vacate, the defendants were not given notice. A perusal of the mortgage which was made a part of this record on all four pieces of property, the mortgage has several paragraphs that pertain to the defendants. Section 14 says explicitly "except for any notice required under applicable law to be given in another manner, any notice to borrower provided for in his mortgages shall be given by mailing such notice by certified mail addressed to borrower at the property address or such other address as the borrower may designate. Any notice to the lender shall be given by certified mail, return receipt requested. Any notice provided for in this mortgage shall be deemed to have been given to borrower or lender when

given in the manner designated therein." Number 18, acceleration remedies. That provision in the mortgage requires that the mortgagor ... "the lender, prior to acceleration, shall mail notice to borrower as provided in Paragraph 14, herein specifying (1) the breach; (2) the action required to cure such breach; (3) a date not less than thirty days from the date the notice is mailed to the borrower by which such breach must be cured; and (4) that failure to cure such a breach on or before the date specified in the notice may result in accelerations of the sums secured by this mortgage, foreclosure by judicial proceeding and sale of the property. This notice shall further inform borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of borrower to acceleration of foreclosure. If the breach is not cured on or before the date specified in the notice, lender, at lender's option, may declare all the sums secured by the mortgage to be immediately due and payable without further demand and foreclose." All right. Number 19, "notwithstanding lender's acceleration of the sums secured by this mortgage, borrower shall have the right to have any proceedings begun by lender to enforce this mortgage, discontinued at any time prior to entry of a judgment and forcing this mortgage if (a) borrower pays lender

all sums which would be then due under this mortgage, the note and notes securing future advances; (b) borrower cures all breaches of any of the covenants or agreements of borrower containing this mortgage; (c) borrower pays all reasonable expense." They go on to talk about the cure. Now, based upon the mortgage note that was made a part of the record and that is listed in the testimony and all three docket numbers, the borrower had to have been given notice, not by verbal notice as is indicated in the Affidavit by Mr. Williams. They had to have been given notice, not merely by mailing it to them, that they had breached this contract in this mortgage. They had to have been given notice by certified mail. No where in the testimony is there any indication that the borrowers were given this notice by certified, mail. Not only did they have to be given this notice that they were in breach, they had to have been given a time frame for curing this breach, thirty days. They also had to be told if they did not cure this breach, that the lender would apply to the Court for a judgment and a foreclosure. Now, this is germane because even though there is a Summons and a Complaint which they did not answer, their mortgage note, which is made a part of this record, indicates they had a right to come into court at the hearing and argue the non-existence of a default. So, they could come into court and say, "well,

we came to Mr. Williams and we answered it or we wrote out something in handwriting or there is no breach." They have the right to be at that hearing and argue that. No notice was given to them of that hearing. So, all of the rights, the contractual provisions that were signed and agreed to by both parties were not exercised and finally, they had ... the most important thing, they had the right to reinstate, okay, prior to the entry of judgment enforcing this mortgage, the last point prior to the entry of a judgment enforcing this mortgage was at this mortgage hearing. So, they had the right to come to the mortgage hearing, to have the sums accounted before them that they owed on this mortgage note, and they had the right to reinsert their mortgage based on this. Each one of these docket numbers, the mortgage itself was entered into the record, each one. It was calculated. I believe testimony was given that the note and mortgage have been broken so that the plaintiffs repeatedly used the mortgage and the note as the basis for the foreclosure. The plaintiffs can't come into court and do that unless they follow all the terms. Now, I have cited one case to the Court. That case was the Graham case. There are at least two other cases, which I will pass up to the Court, which talk about allowing the mortgagee and the mortgagor what the reason for the hearing, why they have a right to be present, but more than anything else

in this particular mortgage, they have the right to be present at that hearing because, under the terms of their contract between them and the bank, they had the right to reinstate the mortgage. The only way that they could have reinstated the mortgage was if the bank said to them with notice under this, "this is what you owe. This is what it will require for you to reinstate. If you do not pay this amount, we will then proceed to foreclosure." That did not happen again and all the testimony, I have gone through it repeatedly, there is Affidavits of Personal Service of the Summons and Complaint. No where in any of this, documents in the courthouse records or in an of the testimony that is to indicate that they were ever even given written notice of their default. But, certainly, they were not given by their own contract, by Pee Dee Federal Bank's contract, certified notice. We contend, first of all, that the total arrearages that they owed as of October 2nd would have been three months behind for each piece of property. They would have had to pay those three months for each piece ... each of those four pieces of property. That amount should have been tendered to them that they owed. The bank should have told them you've got thirty days to come up with this money. If you don't, we will walk into court and foreclose. For those reasons, the foreclosure action was not properly held because the bank didn't give

notice and then they didn't give them notice of the hearing. When the bank knew the bank has this mortgage and used it, in fact, to foreclose. So, on the grounds, we are asking that the judgment be vacated, the parties be put back into the position that they were put in prior to this foreclosure, which will require the bank to give them notice, proper notice; which will require them to give them a time to satisfy the breach of the terms of the mortgage. We might add also that since this has happened, the bank has come in, taken the property and acted, we believe, in trust over the property as if the property now belongs to the bank and has allowed an easement to go across the property. So, we have problems of damages here on the property. In addition, we have tenants that have left the property. So, we have problems now of persons to help defray the cost of the note. So, because the bank did these things, now, the true owners are suffering damages, so we're asking that this be vacated and everybody be put back into the position they were prior to the foreclosure. That's it, Your Honor.

THE COURT: Mr. Williams.

MR. WILLIAMS: If it please the Court, Your Honor. In response to some of her arguments, I would note or suggest to the Court that whatever the notice requirements are in the Note and mortgage, they are

not within the notice requirements as required by the South Carolina Rules of Civil Procedure. In any event, all of that is irrelevant for two reasons; (1) the Crawfords were properly served copies of the Summons and Complaint. They did not answer or file responsive pleadings. And everything is alleged properly and every well plead fact in the Complaint is deemed admitted. It is alleged in the Complaint they are in default. They have violated the terms and conditions of both the note and the mortgage. The other reason that it is irrelevant is that it doesn't have anything to do with their motion. Their motion is ... says that it is to vacate the judgments on the grounds that the Crawfords were not given notice of the hearing as required by Rule 5(a). Rule 5(a) simply says, it talks about service of orders and pleadings, et cetera, subsequent to the original Summons and Complaint, notice of any trial or hearing on unliquidated damages shall also be given to parties in default. It does not specify any particular manner or method or time frame in which that notice should be given. It is a true fact that the Crawfords were not given written ... they were not served with a notice of the date, time and place of the hearing. The reason they were not is as a representative of the plaintiff, I was proceeding under Rule 71 of the Rules of Civil Procedure and Rule 71(a) says in part, "only parties who have appeared and filed

pleadings in the action shall be entitled to usual notice of hearings and other proceedings unless the pleadings state an unliquidated claim." Ms. Smalls, as I understand her position is to be that because a Complaint alleged that the plaintiff was entitled to recover reasonable attorneys' fees, and an amount is not stated, that that makes it a claim for unliquidated damages and, therefore, they were entitled to the notice under Rule 5(a). I suggest to Your Honor that the substance of the Complaint was one for liquidated damages and that they weren't entitled to that notice, that even if they were entitled to it, that they got notice because Mr. and Ms. Crawford sat in my office and I told them when the hearing was. And finally, even if they were entitled to some specific form of notice other than what I gave them, Your Honor, I call to the Court's attention Rule 61 of the Rules of Civil Procedure of South Carolina whose heading is ... the heading for which is harmless error. And it is a long sentence, two long sentences, one real long and one sort of long. And if I might, I would read part of it into the record. "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omited by the Court or by any other parties is grounds for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwse disturbing a judgment

order, unless refusal to take such action appears to the Court inconsistent with substantial justice." The second sentence, "the Court at every state of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rise in parties." I submit, Your Honor, that defendants' Crawford were properly served with copies of the Summons and Complaint and which it was alleged that they owed certain sums of money, that they had not paid it, that they were in default under the terms and conditions of both the note and the mortgage in all four of these foreclosures, that they did not answer; that they chose not to retain an attorney to answer, appear or contest it when they are and have been engaged in business and they're not unknowledgeable about such matters; and they admitted every allegation in those Complaints by not answering; that they had actual knowledge of both the date, time and place of the hearing. They had such knowledge not only from ... I believe not only from my having told them directly, but they had such knowledge from dealers with other parties to the Summons ... other defendants. That they had elected not to appear; they elected not to retain counsel; that if, in fact, they were entitled to notice no substantial harm has come to them because of that defect or that failure to provide written notice of more than two or three days. That the foreclosure is perfectly

regular in every respect and perfectly proper and is indisputed that they owed the money and that they didn't pay it. And, I believe, Your Honor, that justice requires that the defendants' motion be denied. This case has been hanging fire for months, almost a year. As a matter of fact it's been more than a year since they made a payment. And, you know, it's time, you know, to go onto something else. And, finally, Your Honor, if, and I say this conditionally if, but do not agree that they are entitled to having any of the judgment vacated, if they are entitled to anything, it would be to have a hearing on the ... to be present at a hearing on the matter of attorneys' fees. And I Submit, Your Honor, that given the fact that they had actual knowledge of a date, time and place of the hearing, that failure to provide any kind of written notice of it, if that was error, was harmless error. That's the plaintiff's position.

THE COURT: Do you have anything in reply?

MS. REDDIX-SMALLS: Yes, Your Honor. First, on the

THE COURT: I believe it might be better if you could speak just a little louder for that machine's benefit.

MS. REDDIX-SMALLS: Okay. All right. First, plaintiff's counsel had said this was a matter of unliquidated damages and the only ... the only issue here on the unliquidated damages, when he read the rule, was

attorneys' fees. I cite to the Court the case of Lewis v. The Converse CORE, Racial Equality. The Supreme Court in 1981 said "in all liquidated damages default hearings, even when no appearance has been made, it is better practice for claimants' counsel to give the defending party four days notice of time and place of hearing. When defendant's part which default is not given the opportunity to participate in damages hearings, trial court and Supreme Court should closely scrutinize the award to prevent harsh, unwarranted results." That's assuming that they were not given notice and the only issue at this hearing was damages. That's the first thing. The second thing, in the plaintiff's Complaint, Paragraph Number 6, the plaintiff pleads that the plaintiff is now the lawful owner and holder of a promissory note and they further say that John T. Crawford and Mary A. Crawford are now delinquent in the payment of installments of principle and interest, that although demand for payment has been made, the said defendants have failed and refused to make payment; that the conditions of said note and mortgage have been broken and the plaintiff declares the entire indebtedness due and payable. The plaintiffs came into court and plead that the defendants were behind in their installment payments. They didn't say how much, they didn't say what amount. The plaintiffs came into Court and said

demand for payment had been made. By the terms of the mortgage note, which, for the record, we can say that the plaintiffs have drawn up. We can assume ... we can take testimony, but we can be assured that the defendants didn't create this mortgage note. By the terms of their mortgage and their notes, they have to give a notice by certified mail. They didn't do that. That was not done in this instance. At the hearing where the defendants were not given notice is where the actual amounts that the defendants owed were put into evidence and testified to. Secondly, plaintiff's counsel said that the arguments that plaintiff .-. that defendants used for their Motion to Vacate were irrelevant because the motion was based on Circuit Court Rule 5(a). The motion is not based solely on Circuit Court Rule 5(a). The motion is based on Circuit Court Rule 5(a), Rule 60(b)(5). It's also based on all the pleadings and the testimony and the judgment order. The testimony, the pleadings, the evidence, everything in this case, including the mortgage indicates there was a way for the hearing to proceed, notice. Now, the plaintiff also says they gave notice and they gave notice to the defendants in his office. In the testimony I have gone through, there is no indication that the notice was given to the defendant in his office. That's not anywhere ... it's not in the decree of foreclosure; it's not in the testimony; it's no where that I can

find. If that were done and that was the postal fit into this scenario, that that should have been included in part of the record. Substantial rights of the parties. The plaintiff ... (inaudible) ... The wife of the parties to this contract and mortgage are tight in this mortgage and the mortgage note. South Carolina abhors foreclosures unless they are done according to the specific letter of the contractual terms of each part. That is why they make us go through all of these proceedings, to make sure that mortgages are not foreclosed unjustly. They outline how the mortgage foreclosure and how it was to be done. The plaintiffs did that, not the defendant. They admitted, that's why we're here, they admitted that the defendants were not given the notice of a hearing as required in the mortgage. That's all we've said. They weren't given notice of that hearing. They didn't do it. They've already admitted that. We're not here arguing about maybe they sent them a letter; maybe they didn't. They've admitted that. Based on that alone is enough to vacate your judgment. This ... the Rule 60(b) that we used to come in here allows the vacation of judgment. Otherwise, we would have a system that says no judgment can be vacated; sorry. Go on up on appeal. So, the plaintiffs had already done court for the defendant. There was no notice given. They had a right to be at that hearing. They might could have come into the hearing and

said "we paid you. Here are canceled checks. We paid you. Here are some receipts you signed." Because that's not outlined in their pleading. They had a right to be there. And not ... and because they've admitted that, all we're saying is this motion here is proper. The judgments on all three should be vacated

THE COURT: All right. Is there anything you all want to submit to me in the way of law, I am receptive.

MR. WILLIAMS: All right.

THE COURT: I want to make this statement for the record, though, before we conclude this hearing. Prior to the hearing and after Ms. Smalls asked that I hear this motion to vacate the judgment, I had occasion to use certain property that I own as collateral for a loan which was being made to my son by Pee Dee Federal Savings Bank. This was after the judgment was rendered in the Savings Bank against Crawford case. In connection with that loan, Mr. J.P. Williams did a title examination of the property that was being offered as collateral for the loan for my son. When this Motion to Vacate was made, I called Mr. Williams' attention to the fact that I was probably disqualified to hear this motion for the reason that even though he was primarily representing my son, my name was also signed to this mortgage. I asked him if he

wouldn't get ... see if Judge Waller wouldn't hear this motion. He advised me that he did discuss it with Judge Waller and Judge Waller said he was not going to appoint anybody else to hear the motion, that I should go ahead and hear it. So, I put this in the record so that if you want to appeal from that, then you can also appeal from that to the Supreme Court in the event my ruling is not satisfactory. Is there any disagreement as far as you are concerned now as to what happened between you and Mr. Williams and Judge Waller? I believe you all went before Judge Waller one time, isn't that correct?

MS. REDDIX-SMALLS: That's correct, and he indicated that the trial judge would have to be the judge that would hear this matter. Your Honor, if I may ask a few questions; you indicated that you are the ... are you a co-signer on the note or you simply put up collateral, your property?

THE COURT: Well, I had to sign the note. I signed the note and the mortgage. The mortgage will be released at a later date when the building that my son is building is completed. I will make the further statement for the record that I think that there's no reason why I can't be impartial in the matter, but I did want you to know that that is the situation. I didn't know any other way to do it.

MS. REDDIX-SMALLS: Sir, I think you did it the correct way. I guess I have some ... my concerns is amounts, period of time, did this ... are you a disinterested party or is this a business relationship with your son? I mean, that is, I guess, would bear whether we would challenge you to ask you to recuse yourself and, of course, you've already said you were going to serve. But, I guess this ...

THE COURT: Well, off the record, this is for a house that my son is building in Murrells Inlet and in order to keep from having to get a construction loan, what I'm ... what it winds up is that I'm really lending him my credit. After the building is complete and it's supposed to be appraised and my property is supposed to be released from the mortgage.

MS. REDDIX-SMALLS: Well, in that light, Judge, then you have a business relationship with the defendant, I would say. That there remains

"

THE COURT: No question about it.

MS. REDDIX-SMALLS: That there is a business relationship with the defendant.

THE COURT: I've been doing business with them for about forty years.

MS. REDDIX-SMALLS: Yes, sir, but in this instance there is a business relationship that is arising you said after I filed this motion.

THE COURT: That's correct. And long after the judgment was rendered.

MS. REDDIX-SMALLS: Long after the judgment was rendered. But it was after this Motion to Vacate was filed. We would, of course, ask the judge to disqualify himself. Nothing personal, but because of that business and there has to be some sort of fiduciary relationship of the bank, too, Your Honor, and, of course, we're dealing with mortgages and the relationship of the bank and what the bank did in processing the mortgage. We would ask that the judge disqualify himself strictly on that basis because there is those canons that say we must avoid even the appearance of impropriety. We would ask that.

THE COURT: Well, I'm ... yes, sir.

MR. WILLIAMS: Excuse me, Your Honor. I don't mean to interrupt you. I was just going to suggest that you might ... that the record might be made clear that the loan was made by Pee Dee Federal to your son and he had a lawyer at the Beach who certified title for him on the property where he's ... actually what it is, he's getting an old house and moving it to a lot. My representation was of Judge Norton's son, solely because his lawyer at the Beach couldn't come up here, it wasn't convenient for him to come down and certify the title, and I believe that Your Honor has indicated that if were the situation such that somebody else could hear it,

then that would be the case. And ... (inaudible) ... along those lines. And to further supplement the record, at Judge Norton's request, I did approach Judge Waller as we were crossing the street together maybe a month ago and asked him, you know, apprised him of the facts and suggested that it might be better if he were to appoint somebody else or else hear it himself or, you know, let it get back on the non-jury roster for some circuit judge to hear it, and it was his feeling that ... it was his opinion that the matter having been referred to Judge Norton with finality, that it was his to hear and deal with and the Supreme Court deal with it thereafter if there was a question about it. So, that... I will add that as a supplement.

THE COURT: All right. Well, we'll let the Supreme Court decide whether I'm disqualified or not if we have to go to them.

MS. REDDIX-SMALLS: All right. Thank you.

(There being no further comments, the hearing was concluded).

Appendix 34

PETITION FOR REHEARING
(Caption Omitted)

HEREWITHIN, AND FILED ON THE DATE OF JUNE 29, 1993, THE ABOVE MOTION FOR PETITION OF REHEARING FOR THE ABOVE MENTIONED CASE, FILED AS REQUIRED ON OR BEFORE JUNE 29, 1993, AS REQUIRED BY ACTION OF SUPREME COURT APPEALS RULES.

THE FOLLOWING ISSUE OF APPEALING THIS ACTION ON OR BEFORE THE DATE OF JUNE 29, 1993, IS HEREIN DISCLOSE AS FOLLOWS:

THE RECORD REFLECTS THAT THE CRAWFORDS WERE MADE AWARE OF THE HEARING FOR FORECLOSURE, BUT IN EFFECT NO NOTICE, VERBALLY NOR WRITTEN NOTICE WAS GIVEN TO THE CRAWFORDS AS PER THE ACTION TO BE TAKEN IN REFERENCE TO THE FORECLOSURE ACTION ON THE FORESAID PROPERTIES. APPELLANTS HAD NO KNOWLEDGE THAT A HEARING WAS TO BE HELD OR WAS HELD FOR THE ABOVE PROPERTY TO BE SOLD. ACCORDINGLY NO ACKNOWLEGEMENT WAS SENT BY CERTIFIED MAIL NOR REGULARY MAIL IN THE FINAL ACTION ON THE PROPERTY,

OR VERBALLY AS INDICATED BY MR. WILLIAMS, NOR ANY OTHER PERSONS ASSOCIATED WITH THIS CASE.

THE RECORDS REFLECT THAT WE JOHN T. CRAWFORD AND MARY A CRAWFORD, APPELLANTS, DID NOT RECEIVE "NOTICE OF HEARING, BEFORE THE SPECIAL REFEREE". MR. J.P. WILLIAMS, ATTORNEY FOR THE PLANTIFF, PEE DEE FEDERAL SAVINGS BANK, CONTENDS THAT HE INFORMED US OF THE HEARING DATE, TIME AND PLACE DURING OUR VISIT TO HIS OFFICE. MR. WILLIAMS AFFIDAVIT IS ERRONEOUS.

WE VISITED MR. J/P. WILLIAMS, IN HIS OFFICE AT WHICH TIME TO ASK IF THE MORTGAGES WITH PEE DEE FEDERAL SAVINGS BANK COULD BE BROUGHT CURRENT AND REINSTATED. MR. WILLIAMS, SAID HE COULD NOT MAKE THAT DECISION. MR. WILLIAMS CALLED THE BANK, AS PER OUR REQUEST, AND SPOKE DIRECTLY TO MR. WILLIAM JOHNSON. MR. JOHNSON INFORMED MR. WILLIAMS THAT THE BANK WAS NOT INTERESTED IN ACCEPTING ANY MONIES OR REINSTATING THE MORTGAGES. THE REQUEST WAS MADE THAT THE ONLY ACCEPTANCE WAS THAT THE

LOANS WOULD BE PAID IN FULL. IF THIS WAS NOT COMPLIED WITH THAT PEE DEE BANK WOULD CONTINUE WITH THE FORECLOSURE ACTION.

UPON HEARING THIS FROM THE BANK, WE THANKED MR.. WILLIAMS FOR HIS TIME AND ASSISTANCE AND LEFT HIS OFFICE. AT NO TIME WERE THERE ANY MENTION OF FORECLOSURE HEARING.

UPON THIS MOTION AS DESCRIBED ABOVE WE FEEL THAT OUR. "MOTION FOR REHEARING" BE ACCEPTED.